Federal Court  Cour fédérale

Date: 20200406

Docket: IMM-5844-18

Citation: 2020 FC 492

Ottawa, Ontario, April 6, 2020

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

KAIRUN NAZLIYA SHABDEEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kairun Shabdeen's daughter, S, is a young Canadian adult with disabilities and medical conditions that require supervision and around the clock support. As a result of extensive advocacy by the Shabdeens and others, S was able to move into an apartment at a specialized care facility in Toronto called "Reena" in early 2017. Her father was granted a temporary resident permit (TRP) under section 24 of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 [*IRPA*] to enter Canada to assist with S's transition to the Reena facility. Ms. Shabdeen, a citizen of Sri Lanka who is inadmissible to Canada, was not.

[2] Ms. Shabdeen nevertheless followed Mr. Shabdeen and S from the United States to Canada in late 2017 and claimed refugee status, for which she was found ineligible. A removal order was issued, and Ms. Shabdeen applied for a pre-removal risk assessment (PRRA). She also applied again for a TRP to remain in Canada for a ten-month period to help S adjust to her new living environment. An immigration officer denied Ms. Shabdeen's TRP application, concluding that it was not necessary since S had adapted to her new environment, and since Ms. Shabdeen could remain in Canada until her PRRA application was processed.

[3] Ms. Shabdeen argues that the officer's decision was unfair, as it reached conclusions regarding her daughter's condition and adaptation that could not have been anticipated on the evidence, without providing notice and an opportunity to respond. She also argues that the refusal was unreasonable, as it failed to adequately address the best interests of the child (BIOC), made unsupported findings regarding S's condition, and did not consider the risks and hardship facing Ms. Shabdeen in Sri Lanka.

[4] I conclude that the officer's determination was neither unfair nor unreasonable. With respect to procedural fairness, the officer's determinations pertained to the issues and evidence raised by Ms. Shabdeen, and raised no new questions that required further notice. With respect to substantive reasonableness, I find that the BIOC concept does not apply. S is a young adult, and while her developmental disabilities are a relevant circumstance for consideration, she is not a

child for the purposes of a BIOC analysis. Further, the findings made by the officer were reasonable given the nature of the application that was made, which was by its nature a temporary application to assist S in a transitional period, and the limited evidence filed on the nature and status of that transition.

[5] The application for judicial review is therefore dismissed.

II. The Officer's Decision Was Not Unfair

[6] Ms. Shabdeen's allegations of procedural unfairness arise from the officer's conclusions that S had "fully adapted" to the Reena environment, that her parents' presence was no longer required for that adaptation, and that she could communicate with Ms. Shabdeen by phone, email or videoconference. Ms. Shabdeen argues that these findings were so at odds with the evidence that they were "unforeseeable," and that she did not know the case that she had to meet. She argues that fairness required that she be given notice before such findings were made and an opportunity to respond.

[7] I do not agree that a fairness issue arises. S's transition to her new environment, and Ms. Shabdeen's need to remain in Canada to assist in that transition, were clearly at issue on the application. Indeed, they were the primary grounds put forward for the TRP: Ms. Shabdeen submitted that she needed to remain in Canada "at the very least temporarily while [S] is adjusting to her new living arrangements." The officer's determinations were thus on the very issues raised by Ms. Shabdeen, which she had every opportunity to address through evidence and argument in her application. While Ms. Shabdeen argues that the findings are inconsistent with

the evidence filed, this goes to the substantive reasonableness of the decision, not procedural fairness.

[8] Fairness does not impose an obligation on an officer to give a TRP applicant notice of their intended conclusions on the very issues raised in the application and provide another opportunity to respond. Having raised both the question of S's adaptation to the new facility and Ms. Shabdeen's need to be physically present in Canada during that transition period, Ms. Shabdeen cannot argue that it was "unforeseeable" that the officer would make a determination on whether the transition period was continuing or whether Ms. Shabdeen needed to remain in Canada to continue supporting S or could do so remotely.

[9] Ms. Shabdeen states that had she known that the officer might find that the adaptation was complete or that she could communicate with S by electronic means, she could and would have filed additional evidence, such as the second letter from Reena that she filed on this application. That letter stated, among other things, that "Reena cannot state that [S]'s transition is complete" and that Ms. Shabdeen's presence was very important during this period. If there was additional or updated evidence relevant to the very question that underlay the TRP application—whether Ms. Shabdeen needed to remain in Canada to assist S's transition—it was incumbent on Ms. Shabdeen to file this information, which she could have done with the TRP application or in the 11 months that it was outstanding. The officer did not have an obligation to seek out additional or updated information: *Wu v Canada (Citizenship and Immigration)*, 2016 FC 621 at para 28.

[10] This is not a case where the officer raised an entirely new issue, such as the allegation of human trafficking raised in the *Alabi* case that Ms. Shabdeen relies on: *Alabi v Canada (Citizenship and Immigration)*, 2018 FC 1163 at para 24. Nor did the officer rely on additional unfavourable information or documents not disclosed to Ms. Shabdeen, the concern identified by Justice de Montigny at paragraph 22 of *Maghraoui v Canada (Citizenship and Immigration)*, 2013 FC 883. These cases therefore do not assist Ms. Shabdeen. While procedural fairness may require additional notice and an opportunity to respond to new allegations, issues or evidence, it does not require such additional notice before unfavourable determinations are made on issues and evidence already in play.

[11] I therefore conclude that there was no breach of procedural fairness.

III. The Officer's Refusal of a Temporary Resident Permit was not Unreasonable

A. *Standard of Review and Statutory Framework*

[12] The parties agree that an officer's decision whether to grant a TRP is a discretionary one that is entitled to deference and is therefore reviewable on a reasonableness standard: *Zlydnev v Canada (Citizenship and Immigration)*, 2015 FC 604 at para 15; *Krasniqi v Canada (Citizenship and Immigration)*, 2018 FC 743 at para 14. While this matter was argued prior to the Supreme Court of Canada's decision in *Vavilov*, that case confirms that the reasonableness standard applies to the merits of the officer's decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

[13] A TRP may be granted to a foreign national who is inadmissible or does not meet the requirements of the *IRPA*, if an officer is of the opinion that it is "justified in the circumstances":

Temporary resident permit	**Permis de séjour temporaire**
24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	**24 (1)** Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

[14] As Ms. Shabdeen points out, there is some divergence in this Court's case law as to the standard applicable to a TRP application under section 24. Some decisions have concluded that an applicant must show "compelling reasons" or a "compelling need" to enter Canada: see, *e.g.*, *Osmani v Canada (Citizenship and Immigration)*, 2019 FC 872 at paras 15, 19; *Abdelrahma v Canada (Citizenship and Immigration)*, 2018 FC 1085 at paras 8–9; *César Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 880 at paras 93–97, each quoting *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para 22. Other decisions conclude that imposing a "compelling reasons" standard inappropriately goes beyond the language of the *IRPA*: see, *e.g.*, *Krasniqi* at para 19, quoting *Palmero v Canada (Citizenship and Immigration)*, 2016 FC 1128 at para 21. I need not address this divergence in the present application, as neither the officer's decision nor Ms. Shabdeen's arguments turn on the applicable standard or the question of "compelling reasons."

[15] Regardless of the standard applied, the parties agree that section 24 of the *IRPA* has a different function than its statutory neighbour, section 25. Under subsection 25(1), a party applying for permanent resident status may be granted that status or another exemption from the *IRPA* if the Minister is satisfied that it is justified by humanitarian and compassionate (H&C) considerations. There may be facts or circumstances that are relevant factors for consideration under both sections 24 and 25, but section 24 does not entail a "full scale" H&C analysis: *Rodgers v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093 at para 10; *Wu* at para 32. While a TRP may ultimately lead to permanent resident status (see *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], ss 64–65.1), the parties each described section 24 as being directed to shorter-term exigent concerns.

B. *Best Interests of the Child*

[16] Although not explicit in section 24, an officer must consider a child's best interests when they form part of the circumstances relevant to a TRP application: *Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at paras 14–17; *César Nguesso* at para 105; *Ali v Canada (Citizenship and Immigration)*, 2008 FC 784 at paras 12–13.
Ms. Shabdeen argues that although S is now 23 years old, she is "in fact a child" given her developmental disability and continued dependence on her parents. She asserts that the officer failed to conduct an adequate BIOC analysis, rendering the decision unreasonable.

[17] In my view, the BIOC concept is inapplicable in this case. I agree with and adopt the reasoning and conclusion of my colleague, Justice Shore, on this issue in *Saporsantos Leobrera*: an adult with a disability remains an adult with a disability and should not be considered a

"child" for the purposes of the *Convention on the Rights of the Child* or a BIOC analysis under the *IRPA*: *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587 at paras 1–4, 32–72; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, Can TS 2010 No 8 (entered into force 3 May 2008); *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 57–60.

[18] That said, I agree that S's condition and circumstances are relevant to the determination of Ms. Shabdeen's TRP application. The officer did consider these factors, doing so under the heading "Best interests of the child," given the terminology used in Ms. Shabdeen's application. The question is whether that consideration was reasonable.

C. *Determinations on Transition and Alleged Conflict with the Evidence*

[19] Ms. Shabdeen's application for a TRP was made on the basis of her temporary need to enter Canada to assist S while she adjusted to her new living arrangements at Reena. The application included historical medical and educational information regarding S. It also included a December 2017 letter from the Chief Operations Officer at Reena, which described S's medical diagnoses, her past challenges, the nature of her new living environment and the extensive clinical and support services provided there. The Reena letter included, among other things, statements that:

- S has "limited verbal ability";

- since coming into the Reena program, S's challenging behaviours had "improved significantly" and while still challenging, "are managed well with minimal impact on herself and others";

- the intensive model of support provided by Reena is what is needed for S "throughout her life," that reducing or changing supports could result in a crisis and that such supports are not available in other countries;

- individuals with a developmental disability have "a lifelong need for care and support from their family";

- Ms. and Mr. Shabdeen remain very involved on a regular basis, including calling and visiting every day and having close communication with Reena staff, as well as interpreting S's needs and providing information, advice and suggestions;

- the loss of a parent could traumatize a person with a developmental disability, causing them to decline, withdraw and cause harm to themselves and others.

[20] After reviewing the information provided by Reena, the officer noted that S had been at the facility for at least a year. The officer found it "reasonable to conclude at this point of time [S] is fully adapted to her new environment as her state is not only stable but improved significantly." The officer therefore considered that the reasons for which Ms. Shabdeen requested a TRP were "no longer valid as her presence was not necessary for [S]'s adaptation process." The officer noted that the emotional bond between Ms. Shabdeen and S could continue by telephone, email or videoconference.

[21] Ms. Shabdeen argues that these findings are contrary to the evidence and unreasonable.

[22] With respect to the conclusion that S is "fully adapted to her new environment," Ms. Shabdeen argues that there was no clinical or other evidence on which the officer could have reached this conclusion, and that it was contrary to the information regarding S's condition. This allegation must be assessed in the context of both the section 24 application and the evidence filed in support of it.

[23] The officer's determination was based on their assessment of the limited information in the evidence regarding the transition that formed the basis of the TRP application. Significantly, as the Minister points out, the evidence filed by Ms. Shabdeen contains very little information regarding the nature of S's transition or adjustment to new living conditions, or her parents' role in that transition. Rather, it speaks to S's developmental disabilities generally, and her *lifelong* need for both intensive professional support and the care and support of her family.

[24] The only information directed to S's *transition* to her new living environment was the description of her prior and current situation, with the observations that "since coming into the Reena program, [S]'s behaviours have improved significantly" and are "managed well with minimal impact on herself and others." There is no personal or professional evidence as to ongoing changes in S's condition or behaviour, the need for further transition, the nature of the expected transition period and what it would entail, how long it might take, or whether its length could be estimated. It was not until Reena's further letter filed on this application—which was not before the officer and cannot be the basis for assessing the reasonableness of the

determination—that Reena indicated that they "cannot state that [S]'s transition period is complete" and that they are still learning more about her.

[25] Given that Ms. Shabdeen's application was expressly for "a temporary stay to assist her daughter with this transition," it was incumbent on her to file any relevant information regarding the nature and status of the transition in question. Such evidence might include the recognition that defining the nature or predicting the length or trajectory of such a transition is difficult or impossible. However, in the absence of evidence on the issue, it was reasonable for the officer to review the information about S's improvement in the year that she had been at the facility, and conclude that the transition had occurred. Contrary to Ms. Shabdeen's submission, I do not take the officer as having made definitive findings that veer into medical findings with respect to S's care. Rather, the officer appears to have been appropriately focused on the question before them as framed by Ms. Shabdeen: whether Ms. Shabdeen's presence in Canada was needed for S's ongoing transition to the Reena facility.

[26] Nor do I read the officer as having made a finding that S was fine, had "no further need" for her mother or that her parents were no longer providing any care. Rather, the officer's conclusions address the transitional period identified as the basis for the requested TRP, stating "I consider that the reasons the applicant requests a TRP are no longer valid as her presence is not necessary for [S]'s adaptation process" [emphasis added]. This conclusion was reasonably open to the officer on the evidence filed.

[27] Ms. Shabdeen also takes issue with the officer's conclusion that she and S could continue to communicate by means of phone, email or videoconferencing. She argues that this evidence was inconsistent with the evidence from Reena that S has "limited verbal ability," with earlier medical evidence regarding her restricted language abilities, and with Ms. Shabdeen's evidence that S does not know how to use telephones or computers because she cannot dial or type.

[28] I cannot conclude that the officer's conclusion on this issue was unreasonable, or that it affects the reasonableness of the decision as a whole. The most recent evidence of S's condition confirmed that she had limited verbal skills, and could not herself use a computer or telephone. However, I do not understand the officer as having concluded that S would herself operate the electronic means, but that she would do so with the support provided by the team at Reena. There was no evidence before the officer at the time of their decision that such communication would be impossible, such as that S would be unable to see or understand her mother on a speaker or video link. The absence of analysis of the mechanics or discussion of the obstacles to such communication does not render the decision unreasonable in the context of a TRP application. Electronic communication cannot of course fully replace in person contact, and this would be even more so for families in which a family member has disabilities that affect their ability to communicate. However, the officer's observation that the emotional bond between S and her mother could be maintained through such communication was not unreasonable.

D. *Evidence of Hardship in Sri Lanka*

[29] The TRP application included information regarding conditions in Sri Lanka. Ms. Shabdeen argues that it was unreasonable for the officer not to have considered this

information, both as it related to S and as it related to the hardships that she would face if required to return to Sri Lanka.

[30] With respect to the risks to S, the evidence was clear that the intensive and crucial supports available at the Reena facility in Toronto would not be available to S in Sri Lanka. At the same time, as Ms. Shabdeen concedes, the evidence was also clear that the intention was S would remain at the Reena facility and not return to Sri Lanka, whether or not Ms. Shabdeen obtained a TRP to assist in the transition. As a Canadian citizen, there are no grounds for S to be removed to Sri Lanka. It was therefore not unreasonable for the officer not to address the potential risk or hardship to S in Sri Lanka.

[31] With respect to the risks that Ms. Shabdeen would herself face if removed to Sri Lanka, the officer expressly did not consider these, stating "I did not evaluate them as they will be assessed in her PRRA application." Ms. Shabdeen argues that this is unreasonable in light of this Court's recent decisions in *Abdelrahma* and *Osmani*.

[32] In *Abdelrahma*, Justice Gagné (as she then was) considered the interplay between TRP applications and applications for refugee protection. As she noted, the *IRPA* and *IRPR* "do not prohibit making a TRP application for protection reasons": *Abdelrahma* at para 10. At the same time, the structure of the *IRPA* is such that "[t]he proper forum for an application invoking section 96 or section 97 risks is the refugee claim process," and that "absent truly exceptional circumstances, it would be unfair to allow [an] Applicant to bypass the refugee determination process" through a TRP application: *Abdelrahma* at paras 12, 15. Justice Gagné concluded that

the obligation on an officer reviewing a TRP application is to assess whether there were compelling reasons, including risks under section 96 or 97, to allow the claimant to bypass the normal refugee determination process to grant a TRP: *Abdelrahma* at para 16. Since Mr. Abdelrahma had raised a number of such reasons and these were not analyzed by the officer in a manner allowing the Court to understand the basis for rejection, the decision was unreasonable: *Abdelrahma* at paras 13–14, 17–18.

[33] A similar approach was taken by Justice Brown in *Osmani*, at paragraph 26:

> I turn now to the Officer's reliance on the PRRA. In my view the Officer was not permitted to rely solely on the open PRRA and work permit to the exclusion of all other circumstances. I say this because in this case, the PRRA was offered by CBSA as a means to delay removal which was then taking place. In addition, a PRRA is the last stage in an immigrant's removal from Canada and focusses on as yet unassessed risk in his or her home country. A TRP on the other hand is designed to serve a very different purpose, namely "to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments" as Justice Shore noted in *Farhat* at para 22. The availability of one (a PRRA) does not and may not be used to exclude availability of the other (TRP) because they serve such different purposes. In my view, while reliance on a PRRA may in some cases be relevant, a PRRA may not be the determinative factor in refusing a TRP where other material circumstances are advanced.
>
> [Emphasis added.]

[34] Ms. Shabdeen contends that the officer's refusal to consider hardship in Sri Lanka because of the outstanding PRRA application is contrary to these principles.

[35] In my view, Ms. Shabdeen's argument is not persuasive in light of the manner in which the hardship issues were presented to the officer for consideration on the TRP application. The

hardships in Sri Lanka, for both S and Ms. Shabdeen, were presented as they pertained to the need for S to remain in Canada. They were not presented as a ground relevant to Ms. Shabdeen's TRP application independent of her need to care for S. To the contrary, Ms. Shabdeen recognized that those issues would be addressed in the PRRA.

[36] In presenting the concerns about conditions in Sri Lanka, under the heading "Relocating to Sri Lanka with her parents will not be in [S]'s best interests," the application used the following introduction:

> Leaving aside her parents' fear of return to Sri Lanka set out in Kairun's Pre-Removal Risk Assessment Application, there are a number of additional challenges with respect to [S] relocating to Sri Lanka.
>
> [Emphasis added.]

[37] What follows is a description of S's ability to obtain residence in Sri Lanka as a non-citizen, and the support services and special education system in Sri Lanka for S. While the application goes on to describe general living conditions in Sri Lanka, including violence against religious minorities such as Muslims like Ms. Shabdeen, these are again presented as being relevant to the need for S to remain in Canada rather than being cared for in Sri Lanka:

> These factors are highly relevant to the compelling need to firmly re-establish [S] in Canada. In Sri Lanka, Kairun will face potential religious persecution and significant hardships due to her age, gender, lack of employment prospects and housing, such that caring for [S] in Sri Lanka is not a realistic option. Thus, at the very least, Kairun is seeking a temporary stay to assist her daughter with this transition, and has also made an [*sic*] Pre-Removal Risk Assessment (PRRA) application (see attached).
>
> …Thus, aside from any risks of return addressed in her PRRA application, Kairun's presence at this critical time of transition, and

> to assist her husband with [S], clearly constitute compelling circumstances.

[38] Unlike the situation in *Abdelrahma*, Ms. Shabdeen did not make submissions as to why her own risks upon return to Sri Lanka without S should be considered in the TRP application rather than through the ordinary course PRRA application process. To the contrary, Ms. Shabdeen asked the officer to consider the risks associated with Ms. Shabdeen returning to Sri Lanka with S, *leaving aside* the Shabdeens' own fear of return to Sri Lanka, which she expressly recognized would be considered in the PRRA application.

[39] As Justice Strickland identified in *Mousa*, a decision on a TRP application requires "a fulsome analysis of the reasons put forward by the applicant" [emphasis added]: *Mousa* at para 9; *Osmani* at paras 20–21. Given the reasons put forward by Ms. Shabdeen on the TRP, and recognizing that there is no expectation that S will move to Sri Lanka even if Ms. Shabdeen returns there, it was not unreasonable for the officer to leave consideration of the conditions in Sri Lanka as they pertain to Ms. Shabdeen to the PRRA process.

[40] The same applies to Ms. Shabdeen's argument that some of the issues that were raised could not be considered on a PRRA, namely hardships that Ms. Shabdeen would face due to her age, gender, lack of employment prospects and housing that do not rise to the level of persecution. These hardships, which are not temporary in nature, were only presented as being reasons that "caring for [S] in Sri Lanka is not a realistic option." No argument was made that these reasons ought to be considered owing to their impact on Ms. Shabdeen personally, nor that they were issues that should be considered on the TRP because they could not be considered on

the PRRA application. The officer cannot be faulted for not addressing these risks in a manner not raised by Ms. Shabdeen.

[41] I therefore conclude that the officer's decision not to address the hardships in Sri Lanka given the outstanding PRRA application was reasonable given the reasons presented for the TRP application. I need not address the parties' arguments regarding the applicability or reasonableness of the Minister's guidelines regarding application of section 24 in situations where the applicant has identified refugee protection-related risks, as discussed in *Abdelrahma* at para 11.

[42] Finally, I note for completeness that shortly before the hearing of this matter, the *IRPA* was amended to add subsection 24(3.1), which provides that a foreign national with an outstanding PRRA application cannot apply for a temporary resident permit:

Restriction — pending application for protection	**Réserve : demande de protection pendante**
(3.1) A foreign national whose claim for refugee protection has been determined to be ineligible to be referred to the Refugee Protection Division may not request a temporary resident permit if they have made an application for protection to the Minister that is pending.	**(3.1)** L'étranger dont la demande d'asile a fait l'objet d'un constat d'irrecevabilité ne peut demander un permis de séjour temporaire si sa demande de protection au ministre est toujours pendante.

This provision was not in force at the time of the officer's rejection of the TRP and neither party argued that it was applicable to Ms. Shabdeen's TRP application or affected this application for judicial review.

IV. Conclusion

[43] The application for judicial review is therefore dismissed. No party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-5844-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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